The Law Commission

Working Paper No. 101

FAMILY LAW
REVIEW OF CHILD LAW:

Wards of Court

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The Law Commissioners are:

The Honourable Mr Justice Beldam, *Chairman*
Mr. Trevor M. Aldridge
Mr. Brian Davenport Q.C.
Professor Julian Farrand
Professor Brenda Hoggett

The Secretary of the Law Commission is Mr. J. G. H. Gasson and its offices are at Conquest House, 37–38 John Street, Theobalds Road, London, WC1N 2BQ.

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All correspondence should be addressed to:

Mr. P. G. Harris,
Law Commission,
Conquest House,
37–38 John Street,
Theobalds Road,
London,
WC1N 2BQ

Tel: 01-242 0861 Ext. 224

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REVIEW OF CHILD LAW:

WARDS OF COURT

SUMMARY

This consultative paper is the fourth and last in a series about the law relating to the upbringing of children.

It examines the peculiar jurisdiction under which children become wards of court. The special features and practical uses of wardship are identified and discussed. The paper suggests that the universal character of wardship and the restrictions on its use create anomalies and make it inconsistent with the statutory codes relating to custody and to the care of children by local authorities. Some basic options for reform, designed to reduce or eliminate these defects, are put forward.

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THE LAW COMMISSION

WORKING PAPER NO.101

FAMILY LAW

REVIEW OF CHILD LAW

WARDS OF COURT

PART I

INTRODUCTION

1.1 A "ward of court" is a child whose guardian[1] is the High Court. In this paper we consider the institution of judicial wardship and canvass options for its reform.

Background to the Paper

1.2 The paper, which continues the sequence beginning with our Working Papers on Guardianship[2] and

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1 R. v. Gyngall [1893] 2 Q.B. 232, 239; Re Newton [1896] 1 Ch. 740, 745. Although nowadays it is more usually said that the court has "custody" (see Re W. [1964] Ch. 202, 210 and Re C.B. [1981] 1 W.L.R. 379, 388), we prefer the term "guardian", which denotes more clearly the totality of parental powers and duties.

2 (1985) Working Paper No. 91.

on Custody,[3] forms part of our review of the private law relating to the upbringing of children. We have already referred[4] to the interaction between the private law in this field and the public law relating to the child care responsibilities of local authorities. This interaction is particularly noticeable in wardship, whose universal character makes it available not only to individuals but also to authorities in support of their statutory powers.

1.3 We have stated the two objectives of our review in these terms:- "... on a technical level, we wish to rationalise and simplify a system which contains many gaps, inconsistencies and unnecessary complexities; more importantly, however, we wish to ensure that the law itself accords as best it can with the first and paramount consideration of the welfare of the children involved."[5]

1.4 An examination of wardship is essential to the fulfilment of these objectives, for the following principal reasons:-

(a) Wardship may be out of date. It has its origins in the feudal system and, unlike other jurisdictions relating to the upbringing of children, it is largely a creature of common law.

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3 (1986) Working Paper No. 96.

4 Working Paper No. 91, para. 1.3.

5 Working Paper No. 96, para. 1.3.

We need to consider whether a jurisdiction with such a remote ancestry remains relevant to the needs of the present day and whether its continuance as a common law system is acceptable within the predominantly statutory framework of family law.

(b) The universal character of wardship may result in duplication and conflicts of jurisdiction. Within broad limits the jurisdiction may be invoked by any person, in respect of anyone under the age of 18, on any occasion, and the court may make any order or direction which the welfare of the child may require. In principle, therefore, the wardship court may not only make orders which are available to other courts in other jurisdictions (such as divorce, guardianship of minors and care proceedings) but also override such orders.

(c) Although wardship is in principle universal, the courts have placed considerable restrictions on the exercise of the jurisdiction, and its use by comparison with the use of other jurisdictions relating to children is infrequent. Discrepancies between theory and practice may be a source of confusion and injustice.

(d) Although the county courts now have a limited jurisdiction in wardship,[6] wardship is

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6 Matrimonial and Family Proceedings Act 1984, ss. 37-39, R.S.C., 0.90, r.2B and Direction given on 23rd February 1987 by the President of the Family Division under section 37.

largely a matter for the High Court. This again means that, while in theory universal, it is available in practice only to those with the resources to invoke it. Since the great majority of judicial decisions affecting children and their families are made by county courts or magistrates' courts, we might ask whether wardship should remain so exclusive. This question, which was raised in 1967 in the Report of the Committee on the Age of Majority[7] and deferred after the Committee on One-parent Families[8] was set up in 1969, has now re-surfaced with the publication in May 1986 of a Consultation Paper by the Interdepartmental Review of Family and Domestic Jurisdiction. If a unified family court with a unified jurisdiction were to be established, the question whether wardship should be universal or in some way retain its present exclusivity would have to be resolved.

(e) Specific proposals for reforms of wardship have also been made. In 1984 the Report of the Social Services Select Committee on Children in Care suggested that wardship should be reserved for rare and exceptional cases, and that the Family Division should "exercise self-denial in preventing wardship

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7 (1967) Cmnd. 3342 ("the Latey Report"), para. 248.

8 See their Report (1974) Cmnd. 5629 ("the Finer Report").

becoming too ready of access".[9] In 1985 our Report on Custody of Children - Jurisdiction and Enforcement within the United Kingdom mentioned two aspects of wardship for consideration in our current review, namely (a) the basis of jurisdiction in wardship to make orders other than orders for care and control, access and education, and (b) the rule that an application to make a child a ward of court has the automatic effect of temporarily prohibiting his removal from the jurisdiction without leave of the court.[10] Later in 1985 the Review of Child Care Law endorsed the view that wardship was needed only in exceptional cases,[11] and recommended that we consider in the course of this review the circumstances in which wards of court may be committed to care.[12]

(f) Recent and proposed changes in the statutory jurisdictions relating to children, designed to provide new procedures and powers in many circumstances in which wardship is more frequently used, prompt the question whether it is any longer either needed or justifiable as a separate jurisdiction. Recent changes include the introduction of custodianship

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9 1983-84 HC 360, para. 82.

10 Law Com. No. 138 (1985), paras. 1.24-1.27 and 6.24-6.30; these questions may require further consideration in the light of the eventual choice between the options canvassed in Part IV of this paper.

11 Review of Child Care Law - Report to Ministers of an Interdepartmental Working Party (1985) ("R.C.C.L."), para. 2.32.

12 R.C.C.L. para. 15.38.

under Part II of the Children Act 1975,[13] new criminal offences of child abduction under the Child Abduction Act 1984,[14] new provisions under the Child Abduction and Custody Act 1985[15] for returning to their own country children who have been wrongfully removed to or retained in the United Kingdom, and provisions in Part I of the Family Law Act 1986 for the better enforcement of custody orders and of orders restricting the removal of children from the jurisdiction.[16] Proposed changes include recommendations in the Review of Child Care Law for extending the powers of the courts in care proceedings and for improved procedures,[17] and provisional proposals in our Working Papers on Guardianship and Custody regarding parental responsibilities and the powers of the courts to allocate those responsibilities.[18]

1.5 We have discussed these and other aspects of wardship with the President of the Family Division,

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13 On 1 December 1985: S.I. 1985 No. 779.

14 On 12 October 1984: section 13(2).

15 On 1 August 1986: S.I. 1986 No.1048.

16 Part I of the 1986 Act is based upon the draft Bill annexed to our Report on Custody of Children - Jurisdiction and Enforcement within the United Kingdom (1985) Law Com. No. 138. The Act is not yet in force.

17 R.C.C.L., especially Chapters 14-16 and 21-22. The proposals of the Review have largely been accepted by Government: see The Law on Child Care and Family Services (1987), Cm.62.

18 Working Paper No. 91 (Guardianship), Parts III and IV; Working Paper No. 96 (Custody), Part VII.

judges and registrars, the Official Solicitor and legal practitioners. In addition, Mrs. Sheelagh Morton of Leicester University has shown us some results from her study of the use of wardship by local authorities. We are very grateful to the President, and to all those involved, for their help and co-operation. This paper represents no views (except where quoted) other than our own.

The Place of Wardship in a Code

1.6 The object of the Review of Child Care Law was to make proposals for the codification and amendment of child care law.[19] We ourselves have expressed the hope that it will be possible to bring together into a single comprehensive code the many concepts and procedures used in private law to allocate responsibility for children to individuals.[20] Such a code would be incomplete if wardship, assuming it is to survive, were to be excluded. Moreover, once the statutory jurisdictions have been comprehensively reviewed and brought up to date, it must be questioned whether it is any longer justifiable to have a universal jurisdiction capable of overriding or transcending the ordinary limits set by Parliament.

1.7 In Part II of this paper we outline the main features of wardship; in Part III we examine its current uses and the impact upon them of recent and proposed changes; and in Part IV we discuss three

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19 R.C.C.L., para. 1.1.

20 Working Paper No. 96, para. 1.2.

options for reform. The subject raises such fundamental issues that we have thought it right to present these, and the broad options for approaching them, quite shortly. Further consideration will depend upon which approach eventually finds favour.

PART II

THE MAIN FEATURES OF WARDSHIP

2.1 In this Part we outline the main features of wardship, and the ways in which it differs from the statutory jurisdictions relating to the upbringing of children.

Definition of Judicial Wardship

2.2 Wardship is a system whereby any person may, by issuing proceedings for the purpose, make the High Court guardian of any child within its jurisdiction, with the result that (1) no important step in the child's life can be taken without the Court's leave and (2) the Court may make and enforce any order or direction consistent with the principle that the first and paramount consideration is the welfare of the child ("the welfare principle").

Common Law and Statute

2.3 The law relating to wardship is principally common law. At the heart of it is the prerogative

jurisdiction,[1] which was developed on the basis that it was the Sovereign's prerogative as *parens patriae* to have the care of those who cannot look after themselves and that this prerogative was delegated to the court. This broad jurisdiction may be exercised outside wardship,[2] which has been described as the convenient machinery for its exercise,[3] but recently this does not seem to have been done and no other procedure for initiating proceedings under the prerogative jurisdiction is prescribed by rules of court.

2.4 Parliament has intervened at certain points. The Supreme Court Act 1981 lays down the basis of the procedure for making a child a ward of court and for de-warding him, and assigns the wardship jurisdiction to the Family Division of the High Court.[4] The Family Law Reform Act 1969 (which reduced the age of majority from 21 to 18) makes provision for the maintenance of wards of court and for their committal to the care of a

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1 *Eyre* v. *Countess of Shaftesbury* (1725) 2 P. Wms.103,118.

2 E.g., by injunction, see *Re N.* [1967] Ch. 512; cf. *Re E.* [1955] 1 Ch. 23; see also *S.* v. *McC.*, *W.* v. *W.* [1972] A.C. 24.

3 *Re L.* [1968] 1 All E.R. 20, 25, *per* Lord Denning M.R.

4 Supreme Court Act 1981, s.41 and Sched. 1, para. 3(ii).

local authority or their supervision by authorised officers.[5] The Matrimonial Causes Act 1973 enables the court, when it has power in proceedings for divorce, nullity or judicial separation to make a custody order, to give directions for proceedings to be taken to make the child a ward of court.[6] The Matrimonial and Family Proceedings Act 1984 provides for the transfer of limited items of wardship business to the county court.[7] The Family Law Act 1986 defines the international bases of jurisdiction for the making of custody orders (including orders for care and control, education or access in wardship proceedings[8]) by courts in the United Kingdom.

Availability

2.5 Any person (including a local authority and the child himself acting by his next friend) can apply for a child to be made a ward of court. The only limit upon this freedom of application is procedural: on issuing the summons, the applicant must state his or her interest in or relationship to the child, and if the recording officer doubts the propriety of the application he should refer it to the registrar. If the registrar considers it an abuse of the process of the court, he may dismiss the summons or refer it to a judge.[9] In practice, this hardly ever occurs.

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5 Sections 6 and 7.

6 Section 42(1).

7 Section 38(2)(b).

8 Sections 1(1)(d), 2(2) and 3.

9 See Practice Direction [1967] 1 W.L.R. 623.

2.6 Although the court itself cannot strictly "apply" for wardship, even through the Official Solicitor,[10] it can perhaps, under its inherent jurisdiction, direct an application to be made, and there is express provision for such a direction to be given in proceedings for divorce, nullity or judicial separation.[11]

2.7 The right to initiate proceedings under the statutory guardianship and custody jurisdictions is at present only available to parents or guardians, spouses (by way of divorce or other matrimonial proceedings), and persons qualified by relationship or residence to apply for custodianship,[12] although once such proceedings have been initiated it is open to the court to make certain orders in favour of third parties, including local authorities. The right to initiate care proceedings is available only to local authorities, constables and persons authorised by the Secretary of State.[13]

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10 Re D. [1976] Fam. 185, 196-198.

11 Matrimonial Causes Act 1973, s.42(1).

12 See Guardianship of Minors Act 1971, ss.9, 10 and 11; Matrimonial Causes Act 1973, s.42; Domestic Proceedings and Magistrates' Courts Act 1978, s.8; Children Act 1975, s.33.

13 Children and Young Persons Act 1969, s.1(1); only the N.S.P.C.C. is so authorised.

Immediacy

2.8 Wardship is not merely available. It is instantly available. On the issue of the proceedings the child automatically becomes a ward of court, though only for 21 days unless an appointment with the registrar is booked within that period or the court makes an order confirming the wardship.[14] The effect of this, as stated in the notice accompanying the originating summons, is that "without the leave of the court a Ward of Court may not marry or go outside England and Wales nor should there be any material change in the arrangements for his or her welfare, care and control or education without such leave".[15]

2.9 In none of the statutory jurisdictions does the mere issue of proceedings have such an immediate and drastic effect. An order must almost always first be obtained, although in some courts this can be done rapidly and even ex parte if need be.

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14 Supreme Court Act 1981, s.41 and R.S.C., O.90, r.4.

15 Under the Family Law Act 1986, s.38, not yet in force, a ward of court may go to another part of the United Kingdom where he is habitually resident or there are already divorce proceedings on foot between his parents, except that a 16 or 17 year old may not go to Scotland (because the courts there would not be able to make orders about him); see Law Com. No. 138, paras. 6.24-6.30.

The Children Concerned

2.10 All children under 18 who owe allegiance to the Crown are theoretically subject to the wardship jurisdiction.[16] The statutory custody jurisdictions also apply up to the age of 18, although they are rarely exercised in respect of 16 and 17 year olds, but care proceedings may only be brought (or committal to care under other statutes ordered) if the child is under 17[17].

2.11 Under the Family Law Act 1986, however, the court will normally only have jurisdiction to make orders in wardship for care and control, access or education on the basis applicable to other custody jurisdictions, i.e. (a) where the child is habitually resident in England and Wales, or physically present in England and Wales and not habitually resident in Scotland and Northern Ireland and (b) where not excluded by proceedings for divorce, nullity or judicial separation in Scotland or Northern Ireland between the child's parents.[18] Wardship however is exceptional in that where there is an emergency the jurisdiction is exercisable on the basis of the child's

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16 Allegiance is owed by those who are British subjects or present or ordinarily resident within England and Wales: Re P.(G.E.) [1965] Ch. 568, 587.

17 Children and Young Persons Act 1969, s.1(1) and s.70(1); Family Law Reform Act 1969, s.7(3) as applied by Matrimonial Causes Act 1973, s.43(4); Domestic Proceedings and Magistrates' Courts Act 1978, s.10(7); Guardianship Act 1973, s.4(2)(a); Children Act 1975, s.34(5).

18 Family Law Act 1986, ss. 2 and 3.

physical presence in England and Wales regardless of his place of habitual residence, and regardless of the existence of divorce, etc. proceedings in Scotland or Northern Ireland.[19] These jurisdictional restrictions do not apply to care proceedings or to custody proceedings (including wardship) if the child is committed to local authority care.[20] (All may be excluded in international cases where proceedings are brought under the Child Abduction and Custody Act 1985.)[21]

The Courts Concerned

2.12 The High Court has exclusive jurisdiction to make a child a ward of court and to de-ward him. Intermediate decisions, however, may now be transferred to and from the county court in accordance with the directions of the President of the Family Division.[22] This will enable further orders to be made or leave to be obtained for "material changes" in relation to wards in courts which are both cheaper and more convenient for many parties than is the High Court. It remains to be seen, however, whether this will lead to an increase in its use at the expense of other jurisdictions.

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19 Ibid., s.2(2)(b).

20 Ibid., s.1(1)(d).

21 Child Abduction and Custody Act 1985, s.9 (Hague Convention), s.20(2)(a) (Council of Europe Convention), s.27(1) and Sched. 3.

22 Matrimonial and Family Proceedings Act 1984, s.37. See the President's Direction of 23rd February 1987.

2.13 Most custody and related orders are made in divorce or other matrimonial causes in county courts, in matrimonial proceedings in magistrates' domestic courts, or in Guardianship of Minors Acts proceedings in magistrates' domestic courts or county courts, although the High Court also has jurisdiction in divorce and under the Guardianship of Minors Acts. Similarly, there is concurrent jurisdiction in the High Court, county courts and magistrates' domestic courts in custodianship proceedings. Care proceedings, however, may only be brought in juvenile courts.

The Official Solicitor

2.14 The Court may direct that the child be made a party, but this should only be done in "special circumstances", particularly if the child is not old enough to express a view.[23] It is most common, therefore, in cases involving older children or local authorities. A guardian ad litem must be appointed and this is often the Official Solicitor,[24] but might be a social worker who has already been appointed for the purpose of proceedings in a juvenile court. Similar provisions apply in divorce and other county court proceedings but are rarely invoked.

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23 Practice Direction [1982] 1 W.L.R. 118.

24 There were 385 new references to the Official Solicitor in 1985, and the total extant that year was 1415; references are not common outside the Principal Registry.

The Effects of Wardship

2.15 Wardship has two unique effects:

(1) no important step in the child's life can be taken without leave of the court;[25]

(2) the court is empowered to make any order for the protection of the child or in relation to his upbringing.[26]

These effects are often expressed by saying that the court becomes 'guardian' or has 'custody' of the child. The analogy cannot be pressed too far: it does not imply the continuous exercise of parental responsibility. Hence the court will normally grant "care and control" of its ward to whoever (among those available) is best able to look after him. The court does not grant custody as such, although in many cases the practical effect will be much the same. The person (or body, such as a local authority) with care and control, however, is always subject to the "important steps" rule.

2.16 Important Steps. There is no precise test for determining what is an 'important step'.[27] Such matters as marriage,[28] removal from the jurisdiction,[29]

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25 Re S. [1967] 1 W.L.R. 396, 407, per Cross J.

26 Re N. [1974] Fam. 40, 47, per Ormrod L.J.

27 See generally Lowe and White, Wards of Court, 2nd ed. (1986), Ch. 5.

28 Eyre v. Countess of Shaftesbury (1725) 2 P. Wms. 103.

29 Re H.(G.J.) [1966] 1 W.L.R. 706.

placement for adoption[30] and adoption proceedings[31] and change of name[32] are obviously important, as are changes of education or religious upbringing;[33] a change of placement for a child in local authority care, particularly into long-term foster care with a view to adoption, is also included[34] and the direction of a judge exercising wardship jurisdiction is expressly required where a local authority proposes to place or keep a ward of court in secure accommodation.[35] Other steps such as medical treatment are not invariably important for this purpose.[36]

2.17 There is no other jurisdiction in which the court automatically retains such extensive control after it has been decided where the child will live. All custody orders may later be varied or replaced on application to the court, or superseded by some later order elsewhere. The powers of the court in divorce and other matrimonial causes to make such orders as it thinks fit for the custody and education of the child may also be used to give specific directions about particular aspects of his upbringing.[37] But it is only

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30 Re W. (1982) 3 F.L.R. 356; Re C.B. [1981] 1 W.L.R. 379.

31 F. v. S. [1973] Fam. 203.

32 Re H. (G.J.) [1966] 1 W.L.R. 706.

33 C. v. C. [1966] 1 W.L.R. 1418; Re E. [1964] 1 W.L.R. 51.

34 Re C.B. [1981] 1 W.L.R. 379.

35 Child Care Act 1980, s.21A and the Secure Accommodation (No. 2) Regulations 1983, regs. 5 and 10, as amended by the Secure Accommodation (No. 2) (Amendment) Regulations 1986.

36 See Lowe and White, op. cit., paras. 5.21-5.23.

37 E.g. Re L. [1968] 1 All E.R. 20.

in wardship that all material steps must be referred back to the court unless specifically exempted. In practice, however, there may be little the court can do to ensure that this happens,[38] and cases are not usually returned to the court for regular reviews.

Powers

2.18 Many of the inherent powers exercised in wardship are or soon will be also conferred by statute and upon other custody jurisdictions. These include the powers to order disclosure of the child's whereabouts,[39] the surrender of his passport,[40] and the return of the child and his recovery by authorised officers.[41] In some cases, statute has conferred express powers in wardship proceedings which are equivalent to those in the statutory custody jurisdictions, principally to make supervision orders,[42] to commit to local authority

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38 Although the threat of contempt is always there, it cannot always be carried out, especially against the child's caretaker as the child would also suffer.

39 Family Law Act 1986, s.33 (when in force). For the inherent power in wardship see Hockly v. Lukin (1762) 1 Dick. 353.

40 Family Law Act 1986, s.37 (when in force). See also Practice Direction [1983] 1 W.L.R. 558.

41 Family Law Act 1986, s.34 (when in force). For the inherent power in wardship see G. v. L. [1891] 3 Ch. 126.

42 Family Law Reform Act 1969, s.7(4) (wardship); Matrimonial Causes Act 1973, s.44(1) (divorce, nullity and judicial separation); Domestic Proceedings and Magistrates' Courts Act 1978, s.9 (matrimonial proceedings in magistrates' courts); Guardianship Act 1973, s.2(2)(a) (applications by parents under Guardianship of Minors Act 1971, s.9); Children Act 1975, s.34(5) (custodianship).

care,[43] and to award maintenance.[44] Curiously, the court's powers to award maintenance differ slightly from those in the other jurisdictions[45] and do not include the power to make lump sum and property adjustment orders which are available on divorce, nullity and judicial separation and will become available under the Guardianship of Minors Acts following the Family Law Reform Bill.[46]

2.19 Usually, however, the powers of the court in wardship are more extensive. When it commits the child to local authority care, it may direct the local authority as to the exercise of their functions under the Child Care Act 1980.[47] More importantly,

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43 Family Law Reform Act 1969, s.7(2) (wardship); Matrimonial Causes Act 1978, s.43 (divorce, nullity, judicial separation); Domestic Proceedings and Magistrates' Courts Act 1978, s.10 (matrimonial proceedings in magistrates' courts); Guardianship Act 1973, s.2(2)(b) (applications by parents under Guardianship of Minors Act 1971, s.9); Children Act 1975, s.34(5) (custodianship).

44 Family Law Reform Act 1969, s.6(2) as amended by Administration of Justice Act 1982, s.50. See also W. v. Avon County Council (1979) 9 Fam. Law 33, in which maintenance was ordered to be paid by the local authority to foster parents, pursuant to the inherent powers of the wardship court.

45 See s.6(4) as to maintenance for former wards of 18 to 20; cf. e.g., Matrimonial Causes Act 1973, s.29.

46 See clauses 12 to 14.

47 Family Law Reform Act 1969, s.7(3) and Matrimonial Causes Act 1973, s.43(5) (which also applies in divorce and other matrimonial causes).

the inherent powers available have never been expressly curtailed. Thus, for example, in the exercise of its power to grant injunctions the range of orders which the court may make in wardship proceedings is as wide as the child's right to protection may require.[48] Moreover, the inherent power to award care and control may be exercised to commit a child to the care of a local authority in circumstances other than those contemplated by the statutory powers to make care orders in family proceedings. It is exercisable even where the ward is over 17,[49] and not merely in the "exceptional circumstances" required by the statutory provisions,[50] but generally in accordance with the welfare principle; and unlike the statutory powers it does not clearly activate the powers and responsibilities conferred on local authorities by Part III of the Child Care Act 1980.[51]

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48 See, e.g., Re V. (1979) 123 S.J. 201, where the court in wardship proceedings granted an injunction restraining one spouse from molesting the other on the basis that this was in the child's best interests.

49 Re S.W. [1986] 1 F.L.R. 24.

50 The statutory power in wardship proceedings is in the following terms:-

"Where it appears to the court that there are exceptional circumstances making it impracticable or undesirable for a ward of court to be, or to continue to be, under the care of either of his parents or of any other individual the court may, if it thinks fit, make an order committing the care of the ward to a local authority" (Family Law Reform Act 1969, s.7(2)).

There are similar provisions in the enactments relating to other family proceedings. See n. 43 above.

51 Lewisham L.B.C. v. M. [1981] 1 W.L.R. 1248. The statutory power attracts Matrimonial Causes Act 1973, s.43, which provides that Part III of the Child Care Act 1980 (apart from ss.23, 24, 28 and 29) applies to children committed to care under the 1973 Act (Family Law Reform Act 1969, s.7(3)).

The Welfare Principle

2.20 Above all, perhaps, wardship proceedings are almost invariably governed by the "first and paramount" consideration of the child's welfare.[52] Following the House of Lords' decision in J. v. C.[53] this effectively means that the child's welfare is the sole criterion when his custody or upbringing (or the administration of his property) is in issue. The only exceptions arise where some other issue, such as freedom of expression, is also involved[54] or where the court declines to exercise the jurisdiction at all.

2.21 Statutory proceedings relating to custody or upbringing in private law are similarly governed by the welfare principle, but are not so universally available. Only through wardship, for example, could an educational psychologist seek to challenge the parents' decision that an 11 year old girl should be sterilised[55] or relatives who are not already looking after the child seek to obtain care of him[56].

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52 Guardianship of Minors Act 1971, s.1.

53 [1970] A.C. 668.

54 Re X. [1975] Fam. 47.

55 Re D. [1976] Fam. 185.

56 See further paras. 3.24-3.26.

2.22 More importantly, perhaps, the wardship jurisdiction can be invoked by local authorities solely on the basis of the child's welfare in circumstances where they would not be able to seek compulsory powers in care proceedings or by assuming parental rights by resolution under the Child Care Act 1980[57]. Applications by local authorities have increased very considerably in recent years and now form a significant proportion of the whole.

Declining Jurisdiction

2.23 It is clear that the existence of other statutory schemes does not oust the wardship jurisdiction.[58] However, the court must now decline to exercise it in a way which conflicts with the statutory responsibilities of local authorities.[59] Nor will the court allow individuals to use wardship as a disguised form of appeal against decisions of lower courts under the statutory schemes.[60] This constitutes the major exception to the universal availability of wardship and to the welfare principle itself.

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57 See further paras. 3.30-3.34.

58 See Re M. [1961] Ch. 328.

59 A. v. Liverpool City Council [1982] A.C. 363; Re W. [1985] A.C. 791.

60 Re K.(K.J.S.) [1966] 1 W.L.R. 1241; Re P. [1967] 1 W.L.R. 818; Re S., The Times, 30 July 1983.

PART III

THE USES OF WARDSHIP

3.1 In this Part we consider the uses to which the wardship jurisdiction is put at present, with a view to identifying those which are already adequately covered by other means, those which would be so covered were current proposals for reform to be implemented, and those for which there would still be no alternative or where wardship offers significant advantages.

3.2 In times gone by, wardship was inextricably linked to property, and was most frequently used to prevent wealthy children from falling into the hands of fortune-hunters who might dissipate their inheritance or lead them into what their families might regard as an undesirable marriages[1]. The link with property gradually came to be regarded as a formality and was finally severed by section 9 of the Law Reform (Miscellaneous Provisions) Act 1949, which enabled a child to become a ward of court whenever an application was made for that purpose[2]. This also ensured that

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1 See Latey Report (1967), Cmnd. 3342, para. 200, and Cross J. "Wards of Court" (1967) 83 L.Q.R. 200.

2 See also the recommendation in para. 34 (ix) of the Report of the Committee on Procedure in Matrimonial Causes (1947), Cmnd. 7024, on which section 9 was largely based.

children did not become wards as an accidental by-product of other applications. More significant were the social and economic changes following the Second World War: the increasing volatility and flexibility of family relationships, the expansion of local authorities' responsibilities to care for children whose families could not do so themselves, and the advent of legal aid gradually gave the wardship jurisdiction a new direction[3]. It came to be regarded not so much as a refuge for orphaned heiresses and a bulwark against predatory adventurers but rather as a means of resolving all kinds of disputes over children whether or not they were amenable to treatment under the statutory jurisdictions relating to custody and to child care.

3.3 That change is reflected in the numbers of originating summonses issued over the years.[4] In 1951 there were only 74. By 1971 this had risen to 622, 2.5% of which involved local authorities. By 1981, there were 1903, some 30% involving local authorities. In 1985, the number reached 2815, at least 40% of which involved local authorities, around 36% as plaintiff and 4% as defendant. In the same year, some 24% of cases involved relatives, although they were plaintiffs in only 13%. Almost all the remaining plaintiffs were parents and a high proportion of their applications involved what may loosely be termed "kidnapping".

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3 See Lowe and White, Ch. 1, and Cross J., op. cit.

4 The statistics in this paragraph are drawn from the Annual Judicial Statistics; percentages have been estimated from a study by Sheelagh Morton of Leicester University commissioned by DHSS, and a study by the Law Commission based on a sample of 705 cases in the Principal Registry in 1985.

3.4 We therefore propose to examine four categories of case in more detail: applications between parents, applications by relatives and other non-parental individuals, applications involving local authorities, and applications attempting to control a recalcitrant older child.

Applications between Parents

3.5 Parents most commonly make use of the wardship jurisdiction where they are at odds with one another. If all that is at issue is custody, care and control, or access, they might just as well apply under section 9 of the Guardianship of Minors Act 1971[5]. Disputes about specific aspects of the child's upbringing, such as his education or medical treatment, may now be dealt with under section 1(3) of the Guardianship Act 1973[6]. The High Court, county courts and magistrates' domestic courts have concurrent jurisdiction under both Acts[7]. There is therefore no need to make the child a ward of court, even where it is desired to invoke the prestige and authority of the High Court, perhaps in a situation where emotions are running particularly high.

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5 This provision enables the court to make orders for legal custody or access on the application of the father or mother (married or unmarried).

6 As between married parents (or, under clause 5 of the Family Law Reform Bill now before Parliament, where unmarried parents have equal rights by order under clause 4).

7 Guardianship of Minors Act 1971, s.15; Guardianship Act 1973, s.1(6).

3.6 The High Court will not refuse to accept a wardship application in such cases simply because another jurisdiction could be used instead[8]. It will decline jurisdiction where wardship is being used as a "second bite at the cherry" or disguised form of appeal in a case which has been decided under another private law jurisdiction[9]. It is, however, by no means unknown for one party to invoke wardship in order to remove into the High Court a case which has already begun at a lower level.[10]

3.7 A more important limitation in practice is that legal aid will not be granted to bring wardship or any other proceedings in the High Court (or indeed in a county court) if these could equally well be pursued at a lower level.[11] The use of wardship for these purposes will therefore be restricted to those who can afford the extremely high costs involved,[12] bearing in

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8 See, e.g., Re C. (1981) 2 F.L.R. 163, Re K. [1971] Fam. 179.

9 Re K. (K.J.S.) [1966] 1 W.L.R. 1241; Re P. (A.J.) [1968] 1 W.L.R. 1976.

10 See, e.g., Re D. [1977] Fam. 158.

11 Legal Aid Act 1974, s.7(5) and (5A).

12 The Report of the Working Party set up to cost the proposals of the Review of Child Care Law estimated the costs to local authorities of obtaining a wardship order in an uncontested case at £5,960 and £7,970 in a contested case. Further, we understand that the average costs of a private plaintiff or defendant in wardship proceedings exceed £1,000.

mind that recovering costs from the other party may be more than usually difficult in cases where there are no clear winners and losers. Legal aid is only likely to be available in those few cases which have some special feature indicating that wardship is more appropriate than the statutory remedies.

3.8 There are perhaps three features of wardship which might make it more appropriate, but we cannot say how large they loom in practice. First, the continued supervision of the court may be thought helpful by either side. A parent with care and control may feel that the child's status as a ward of court will deter the other party from interfering. The other party may feel that it places more limits upon what the parent with care and control may do.

3.9 Secondly, the jurisdiction may be thought more appropriate if an injunction is sought to protect the child either from the other parent or from some third party. The High Court clearly has wide powers to protect its wards in this way,[13] whereas the powers of other courts may be more limited or obscure. magistrates' domestic courts have power as between spouses to protect children of the family from the use or threat of violence, by means of personal protection and exclusion orders under the Domestic Proceedings and Magistrates' Courts Act 1978.[14] County courts have power to make injunctions ancillary to matrimonial causes or to proceedings under the Guardianship of

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13 See para. 2.19 above.

14 Section 16.

Minors Act 1971[15] or to protect spouses or people living together as such, and children living with either, under the Domestic Violence and Matrimonial Proceedings Act 1976.[16]

3.10 It is not obvious, however, how these statutes would help a parent to protect her child against violence or molestation from a third party with whom she was no longer living and who was not the child's parent. Furthermore, there are exceptional cases in which the child may require special protection, for example against the publication of information which might be harmful to the child;[17] in such cases the court must be satisfied that the right to freedom of publication is outweighed by the court's duty to protect the child,[18] but it is clear that such protection can be given and that wardship is the only means of doing it.

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15 County Courts Act 1984, s.38. Re W. [1981] 3 All E.R. 401, but see also Ainsbury v. Millington [1986] 1 All E.R. 73.

16 Section 1.

17 Re X. [1984] 1 W.L.R. 1422, where a generally binding order was made restraining publication of any information identifying the whereabouts and name of a child born to Mary Bell, who at the age of 11 had been found guilty of the manslaughter of boys aged 3 and 4.

18 See Re X. [1975] Fam. 47, where the right to freedom of publication prevailed, perhaps because the publication referred to the activities of the ward's father and not to the ward herself.

3.11 Thirdly, and perhaps most important of all, there is the automatic effect of simply issuing an originating summons, which serves to "freeze" the status quo[19] and may later be reinforced by more specific orders. There are many other proceedings in which ex parte orders may rapidly be obtained, either in order to preserve the status quo or to authorise a change; most commonly, an injunction may be obtained in matrimonial causes or under the Domestic Violence and Matrimonial Proceedings Act 1976 in order to protect both adult and child and is sometimes linked to an interim custody order.[20] There is, however, no other proceeding which has such a draconian effect without any application to a judicial officer who is required to address his mind to whether or not it is needed, or indeed to whether or not there is jurisdiction to accept the case at all.[21]

3.12 Clearly the rule gives scope for abuse. Any type of applicant may ward a child in order to preserve a status quo which is favourable, in the knowledge that it may take some time to obtain an order changing it. On the other hand, wardship has undoubtedly proved most valuable in combating child kidnapping and these cases still form a significant proportion of applications, particularly between parents.[22] In the light of recent changes, however, we must now try to estimate how important this role will be in the future.

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19 See para. 2.8 above.

20 In the latter case, under the Guardianship of Minors Acts 1971 and 1973.

21 See para. 2.5 above.

22 Out of a sample of 55 cases taken from the Principal Registry, 21 involved actual or threatened removal of the child.

3.13 Kidnapping Offences. The removal or retention of a child may be prohibited by law and amount to a criminal offence regardless of the issue of proceedings. The following offences, two of which were created in 1984, may be material so far as parents are concerned:-

(i) Common law kidnapping, where a person is taken or carried away by force or fraud without his consent and without lawful excuse.[23]

(ii) Abduction under section 2 of the Child Abduction Act 1984, where a child under 16 is taken or detained (by a non-connected person, see (iv) below) from lawful control without lawful authority or reasonable excuse.

(iii) Abduction under section 20 of the Sexual Offences Act 1956, where an unmarried girl is, without lawful authority or excuse, taken out of the possession of her parent or guardian against his will.

(iv) Abduction under section 1 of the Child Abduction Act 1984, where a "person connected" with a child under 16 (by

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23 The consent is that of the child if he is old enough to give it; see R. v. D. [1984] A.C. 778.

parenthood, guardianship or the existence of a custody order) takes or sends the child out of the United Kingdom without the consent of the other parent, guardian, etc.

In none of these cases is wardship strictly necessary for the purpose of prohibiting the child's removal: this is prohibited by law and the police are able to take immediate action. The issue of wardship proceedings, however, has the advantage that it imposes prohibitions regardless of whether the removal would have the necessary elements of a criminal offence and whether that offence could be proved in court. On the other hand, the removal or retention of the child to some other place within England and Wales may not invariably constitute a "material change"[24] for the purposes of the automatic prohibition.

3.14 Wardship proceedings may also serve to trigger various administrative procedures for preventing the child's removal or securing his recovery.[25] These include restrictions on the issue of passports for children[26] and the "stop list" system by which the removal of children from ports or airports may be prevented. The issue of wardship proceedings

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24 See para. 2.8 above.

25 See Law Com. No. 138, Report on Custody of Children - Jurisdiction and Enforcement within the United Kingdom, Part IV.

26 Practice Direction [1986] 1 W.L.R. 475; R.S.C., 0.90, r. 3(10). See also Law Com. No. 138, para. 6.9.

remains of value for the purpose of restricting the issue of a passport, because in other proceedings a court order is necessary before the restriction takes effect.[27] The "stop-list" system, on the other hand, was changed with effect from 2nd May 1986.[28] It is now operated directly by the police, who inform the ports of any case brought to their notice where there is a real and imminent threat that the child is about to be removed unlawfully from the country: measures are then taken to stop any attempted removal. No court order is required, unless of course it is the order or the fact that the child is a ward of court which renders the removal unlawful. It follows that where one of the criminal offences mentioned above[29] has been committed, or there is a real and imminent threat that it will be committed, the issue of wardship proceedings is no longer strictly necessary for preventing removal from the jurisdiction.

3.15 Wardship may also be used for the purpose of obtaining specific injunctions against removal. The general prohibition, although universally binding,[30]

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27 Written notice of the court order must then be given to the Passport Office. For a summary of the Passport Office regulations, see (1977) 74 L.S. Gaz. 419.

28 Practice Direction [1986] 1 W.L.R. 475.

29 See para. 3.13.

30 See X. County Council v. A.B. [1985] 1 All E.R. 53.

may not come to the notice of everyone concerned. For this purpose, however, wardship differs little from other jurisdictions. All the courts with custody jurisdiction may impose a general binding prohibition against removal from England and Wales or from any part of the United Kingdom,[31] although only in proceedings for divorce, nullity or judicial separation can such a prohibition be imposed without the making of a custody order.[32] In addition, the High Court and county courts may grant injunctions in custody proceedings against named persons, restraining them from removing the child either from some person or place, or altogether from the jurisdiction.[33]

3.16 Once a child has been wrongly removed or retained, wardship proceedings may be brought to assist in his recovery: the applicant could seek an order for care and control and an order that the child be returned, and if necessary the court could direct the Tipstaff (with police assistance) to search for the child and recover him.[34] There are, however, powers under other jurisdictions to recover children.[35] Is there, then, any special advantage in using wardship?

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31 Matrimonial Causes Rules 1977, r.94(2); Guardianship of Minors Act 1971, s.13A(1); Children Act 1975, s.43A(1); Domestic Proceedings and Magistrates' Courts Act 1978, s.34(1).

32 Matrimonial Causes Rules 1977, r.94(1).

33 Supreme Court Act 1981, s.37 (High Court); County Courts Act 1984, s.38.

34 R.S.C., 0.90, r.3A.

35 See para. 3.18.

3.17 Where the removal is in England and Wales, there is little special advantage to wardship. If the removal constitutes one of the criminal offences listed above,[36] the police have adequate powers to arrest the offender and arrange for the child's return. In any event, where a young child has been removed from a parent or other person with the right to his custody by someone without it, self-help or habeas corpus have been the traditional remedies.[37]

3.18 The main difficulty arises where both parents have equal claims. Under the statutory custody jurisdictions, the courts have powers which, under the Family Law Act 1986, are virtually equivalent to those in wardship, to order the return of a child taken in breach of a custody order and to authorise court officers or the police to recover him.[38] The advantage of wardship is that there are no restrictions on the grant of interim orders, whereas such orders are discouraged in cases under both the Guardianship of Minors Act 1971 and the Domestic Proceedings and

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36 See para. 3.13.

37 See Re A.B. [1954] 2 Q.B. 385; habeas corpus is not, however, appropriate for resolving custody disputes, see Re K. (1978) 122 S.J. 626 (which concerned a 15 year old girl); and self-help against older children may amount to false imprisonment, see R. v. Rahman (1985) S.J. 431.

38 Family Law Act 1986, s.34.

Magistrates' Courts Act 1978,[39] while proceedings for divorce (or some other matrimonial cause) may not be on foot or appropriate.

3.19 United Kingdom Cases. Where a child under 16 has been wrongly removed from England and Wales to Scotland or Northern Ireland or vice versa, Part I of the Family Law Act 1986 provides for the enforcement across the borders of "custody orders" made with jurisdiction under that Act.[40] A custody order made in the court of the "home" country may be enforced as if it were an order of a superior court in the "away" country.[41] A mandatory injunction for the return of the child would of itself be insufficient: there must be a custody order, which in the case of wardship, means an order for care and control, access or education.[42]

3.20 Where the child is removed from England and Wales to Scotland or Northern Ireland, an order in wardship proceedings for care and control and for the return of the child would be enforceable under the 1986 Act by the Court of Session in Scotland or by the High Court in Northern Ireland.[43] So too would similar orders made under the custody jurisdictions. Nor

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39 Guardianship Act 1973, s.2(4)(b), Domestic Proceedings and Magistrates' Courts Act 1978, s.19(1)(ii).

40 Family Law Act 1986, ss.25-32.

41 Ibid., s.29.

42 Ibid., s.1.

43 Family Law Act 1986, ss.29 and 32.

would it be necessary in wardship or in custody proceedings for the merits of the case to be decided first: the court could make an interim custody or care and control order and this too would be enforceable under the 1986 Act.[44] Apart from the greater ease of obtaining interim orders mentioned earlier,[45] the special feature of wardship in such cases is that it can be used in emergencies even where, under the general jurisdictional scheme in the 1986 Act, other custody jurisdictions would be excluded.[46] Thus, even if the child were habitually resident in Scotland and although the Scottish courts would also have jurisdiction, the wardship court could, in an emergency, order his return from Scotland to England and that order would be enforceable in Scotland unless and until a subsequent decision of the Scottish court superseded it. Similarly, where a child is removed from Scotland or Northern Ireland to England and Wales, a custody order of the Scottish or Northern Ireland court would be enforceable here under the Act,[47] but if it were an emergency the wardship court could make an order for the child's return on the basis of his physical presence in England and Wales, and this might sometimes be quicker than proceedings in the home country followed by proceedings for enforcement here. This emergency basis of the High Court's jurisdiction

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44 The definition of "custody order" in section 1 includes interim orders.

45 See para. 3.18 above.

46 See para. 2.11 above.

47 Family Law Act 1986, ss.29 and 32.

is only available where the immediate exercise of the court's powers is necessary for the ward's protection,[48] and so the court would effectively be deciding only whether or not the child should be returned straightaway.

3.21 International Cases. If a child under 16 is wrongly removed from England to, say, France or vice versa, the matter is governed by the Child Abduction and Custody Act 1985, which implements for the United Kingdom conventions (to which France is one of the contracting States) concluded at the Hague International Conference and at the Council of Europe.[49] The Hague Convention concerns the wrongful removal or retention of children in breach of custody rights, whether or not those rights arise by court

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48 Family Law Act 1986, s.2(2)(b).

49 The Hague Convention on the Civil Aspects of International Child Abduction, concluded in 1980, and published in the current Collection of Conventions edited by the Permanent Bureau of the Hague Conference on Private International Law; and the Council of Europe Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, (1981) Cmnd. 8155; on 1st February 1987, the Hague Convention was in force between the United Kingdom and Australia, France, Hungary, Luxembourg, Portugal and Switzerland and all the provinces of Canada except N.W. Territory; and the Council of Europe Convention was in force between the United Kingdom and Austria, Belgium, Cyprus, France, Luxembourg, Portugal, Spain and Switzerland.

order. The appropriate court (in England and Wales, the High Court)[50] in the State where the child is may, and in most cases must, order the return of the child,[51] and cannot decide upon the merits of the dispute.[52] The Council of Europe Convention provides for the recognition and enforcement of "decisions relating to custody",[53] although enforcement may be refused on a number of specified grounds including the defendant's absence, the child's objections if he is sufficiently mature, changing circumstances, or the incompatibility of the decision with the "fundamental principles of the law relating to the family and children in the State addressed" or with a decision already given in the State addressed.[54]

3.22 Where the United Kingdom is the "home" State, the jurisdiction of our courts is unaffected, although whether or not their custody orders are enforceable may depend on whether the basis of jurisdiction is the

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50 1985 Act, s.4(a).

51 Ibid., Sched. 1, Arts. 12 and 13. The court must order the return of the child, unless one year or longer has elapsed since the wrongful removal or retention, and the child is settled in its new environment; or the person with care of the child was not exercising his custody rights or had consented or acquiesced in the removal or retention; or the return would cause grave risk of harm or be intolerable.

52 Ibid., Sched.1, Art. 16.

53 Ibid., Sched. 2, Art. 1.

54 Ibid., Sched. 2, Arts. 9, 10 and 15.

habitual residence of the child. Where the United Kingdom is the "away" State the High Court has exclusive jurisdiction to deal with applications under the Act, and the wardship jurisdiction and other custody jurisdictions are suspended.[55] Nevertheless the party seeking return is free to ignore the Act[56] and either to defend wardship or custody proceedings brought by the other party or to institute such proceedings himself, and in that event the decision will be made in accordance with the usual welfare principle: depending on the facts, the principle might justify a summary order for the child's return or an order made after a full hearing.[57] Since the return of the child does not have to be justified under the Conventions as being in accordance with the welfare principle,[58] it seems probable that those seeking return will proceed under the 1985 Act and those resisting return will attempt to invoke the ordinary jurisdiction. In this respect, wardship is no different from the other custody jurisdictions.

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55 See para. 2.11 and n.21.

56 Child Abduction and Custody Act 1985, ss.9, 20 and Sched. 1, Art. 16.

57 Child Abduction and Custody Act 1985, Sched. 1, Art. 29.

58 See Re L. [1974] 1 W.L.R. 250, Re C. [1978] 2 All E.R. 230 and Re L. [1983] 4 F.L.R. 368; see also Lowe and White, para. 17.56. Return, however, can be refused on the grounds specified in the Conventions; see para. 3.21 above.

3.23 Where the child is removed from England and Wales to a country which is not a contracting State under either the Hague or the Council of Europe Convention, the 1985 Act will not apply. An order for the child's return might be sought in wardship or other custody proceedings, but it would not be enforceable in the other State, although it would be enforceable by contempt proceedings against the kidnapper should he come to England and Wales, or by the sequestration of any assets he may have here.[59] If the child is brought here, the wardship and custody jurisdictions would also be available, on the basis of the child's presence here, as it would be if proceedings were brought in respect of a French child otherwise than under the Conventions.[60] Once again, wardship has no obvious advantage over the other jurisdictions here.

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59 See Re H. (G.J.) [1966] 1 W.L.R. 706. See also Re Liddell's Settlement Trust [1936] Ch. 365, where a mother took her children to the United States against her husband's wishes, and he made them wards of court. The court granted an injunction directing the mother to return the children. She did not comply and a writ was issued against her property which was to be kept under sequestration until she cleared her contempt. Cf. Re Chrysanthou [1957] C.L.Y. 1748, where a father took his child to Cyprus. The court made the child a ward of court, but did not order the father to bring the child back, as such an order was unlikely to be obeyed.

60 See para. 3.22.

Applications by Non-parents

3.24 Some 13% of wardships initiated in 1985 were begun by relatives, often grandparents.[61] Until December 1985, wardship was almost the only means available to non-parents to bring proceedings in respect of a child's upbringing. If a divorce or other matrimonial cause is on foot in relation to which the child is a "child of the family", anyone may seek leave to intervene in order to apply for custody or access, and some may intervene without leave.[62] If there are proceedings between parents under the Guardianship of Minors Act 1971, or between spouses under the Domestic Proceedings and Magistrates' Courts Act 1978, there is no right to apply but the court may award legal custody to third parties.[63] Grandparents may apply for access if a custody order is made under

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61 This figure is based upon our analysis of a sample of 705 wardship cases in the Principal Registry of the Family Division in 1985. Over 60% of the applications by relatives were made by grandparents.

62 Matrimonial Causes Act 1973, s.42(1) and Matrimonial Causes Rules 1977, r.92(3). For cases where custody was awarded to third parties intervening, see Morgan v. Morgan (1974) 4 Fam. Law 189 (aunt and uncle) and Cahill v. Cahill (1974) 5 Fam. Law 16 (grandparents).

63 Now done by directing that they be treated as if they were able to and had applied to become custodians: Children Act 1975, s.37(3).

either the 1971 or 1978 Act[64] and a grandparent whose child is dead has an independent right to apply for access to the grandchild.[65]

3.25 These very limited rights were supplemented in December 1985[66] by the custodianship provisions of the Children Act 1975. These enable non-parents to apply for legal custody if the child has had his home with them for a total of three years; or for one year if a person with legal custody consents to the application; or for three months if there is such consent and the applicant is a relative or step-parent.[67] In addition, people who apply to adopt may instead be appointed custodians if this is more appropriate, provided that the necessary agreements to adoption have been given or can be dispensed with.[68]

3.26 It is too early to say what effect these provisions may have upon the use of wardship by relatives and other private individuals, but clearly there are still a number of gaps. Unless there are other proceedings on foot, only people with whom the

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64 Guardianship of Minors Act 1971, s.14A(1); Domestic Proceedings and Magistrates' Courts Act 1978, s.14; or now, where a custodian is appointed under the Children Act 1975, s.34(1).

65 Guardianship of Minors Act 1971, s.14A(2).

66 S.I. 1985 No. 779.

67 Children Act 1975, s.33(3).

68 Children Act 1975, s.37(1) and (2).

child is already living may apply for legal custody, and many have to wait some time before doing so. Thus, for example a woman who came to live with an unmarried father and looked after his child, or a grandmother who looked after her recently widowed daughter's child, could not apply for custody without the parent's consent until they had had the child for three years, whereas they could seek care and control in wardship immediately. The wardship application automatically forestalls the removal of the child, whereas a custodianship application only does this if the applicant has had the child for a total of three years, and an adoption application only after five years.[69]

3.27 Further, unless there are other proceedings on foot, wardship is the only way in which most relatives or other interested individuals can seek access to a child or invoke the court's protection if they are unhappy about a particular aspect of the child's upbringing. Again to take two recent examples, only in wardship could a natural mother seek access to a child who had recently been adopted against her will;[70] and only in wardship could an educational

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69 Children Act 1975, s.41 and Adoption Act 1958, s.34A; it is however possible that some earlier removals, at least by non-parents, would be covered by the offences of kidnapping or under the Child Abduction Act 1984; some removals by parents are covered by the Adoption Act 1958, s.34.

70 Re O. [1978] Fam. 196; Re C. [1985] F.L.R. 1114.

psychologist (or indeed her education authority) seek to prevent the sterilization of an 11 year old girl with a congenital handicap.[71]

3.28 Wardship is the only remedy in such cases, but it is not necessarily an appropriate one, as ordinary custody or access orders or injunctions would achieve the same result without the continued supervision of the court. Our proposals on guardianship and custody,[72] if implemented, would greatly reduce the need for non-parents to seek care and control or access through wardship. It is proposed that anyone should be able to seek leave to apply for guardianship (i.e. full parental responsibilities including care and control)[73] and that anyone who has treated the child as a child of the family or is a close relative could apply for an access or visiting order.[74] However, people without guardianship or care and control would not be able to challenge single issues of upbringing, such as medical treatment, without also seeking to take over the care

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71 Re D. [1976] Fam. 185.

72 (1985) Working Paper No. 91; (1986) Working Paper No. 96.

73 Working Paper No. 96, para. 7.33.

74 Ibid., para. 5.61.

of the child.[75] Thus most, but not quite all, of the gaps would be filled.

3.29 There is one important limitation upon the use of wardship which particularly affects non-parents, in that the court will not exercise jurisdiction if this would conflict with the statutory responsibilities of local authorities in the child care field.[76] This effectively rules out the use of wardship by local authority foster parents or by relatives who wish to take over or have access to a child who is already in local authority care. There is no limitation on the institution of custodianship proceedings relating to children in care, although the local authority must investigate and produce a report.[77] In our proposals on custody, it is recognised that a completely "open door" policy might not be appropriate in relation to children in care, so that a residence or a consent requirement might still be imposed.[78] This is nevertheless an improvement upon the present position in wardship.

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75 Ibid., para. 7.36.

76 See paras. 3.39 et seq.

77 Children Act 1975, s.40.

78 Working Paper No. 96, paras. 5.41-5.48.

Local Authority Cases

3.30 The increased use of wardship by local authorities has been the oustanding feature of its development over the past 15 years. In 1985, local authorities were involved in approximately 40% of the wardship cases initiated, in some 36% as plaintiff.[79] In recent years, they have often been encouraged to make use of wardship if it is felt that their statutory powers are insufficient to enable them to protect the interests of children.

3.31 Those statutory responsibilities are largely contained in the Children and Young Persons Act 1969, which enables local authorities to bring care proceedings to seek care or supervision over a child who is in need of care or control in a variety of defined circumstances;[80] and in the Child Care Act 1980, which obliges local authorities to provide a child care service, on a voluntary basis, for certain children whose parents are unable to look after them properly,[81] and empowers authorities to assume parental rights over such children if defined grounds exist, by means of a resolution which can later be challenged in court.[82]

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79 See the Interdepartmental Joint Working Party Review on Costs, 1986, at para. 5.1.

80 Section 1(2)(a) to (f).

81 Section 2.

82 Section 3.

3.32 If the child is not already in care, an authority may institute wardship proceedings where the grounds for care proceedings do not exist. For example, in Havering London Borough Council v. S.,[83] the authority obtained a wardship order for a new born baby whom they had removed from the mother without any legal authority. The grounds for care proceedings deal mainly with current neglect or ill-treatment of the child, or with his behaviour, and only to a limited extent with future harm.[84] Absence of forward-looking grounds for care proceedings may account for as many as half of all local authority applications.

3.33 Local authorities also use wardship where they are unable to appeal against the decisions of juvenile courts in care proceedings. Thus in Re C.[85] a child was made a ward when magistrates refused to make a care order, and in Re D.[86] and Hertfordshire County Council v. Dolling,[87] after a care order had been discharged by, respectively, magistrates and the Crown Court on appeal. Difficulties may arise because of uncertainty about whether the criterion for discharging care orders is based upon the child's current needs or his parents' current circumstances.[88]

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83 [1986] 1 F.L.R. 489.

84 1969 Act, s.1(2)(b) and (bb).

85 (1981) 1 F.L.R. 62.

86 [1977] Fam. 188.

87 (1982) 3 F.L.R. 423.

88 See R.C.C.L., paras. 20.11-20.21.

It may also be thought preferable to provide for the phased return of the child to his family and there is no power to do this in care proceedings.[89]

3.34 Where the child is in voluntary care, the authority may invoke the wardship jurisdiction in order to prevent his parents from removing him. This may be done either because there is no ground for assuming parental rights by resolution, as in Re C.B.,[90] or where it has been held on appeal that the defined grounds did not exist, as in W. v. Nottinghamshire County Council[91] and O'Dare v. Glamorgan County Council.[92]

3.35 These are all cases in which wardship is used to fill gaps in the statutory codes as they are at present. More borderline cases arise where the authority might use the statutory procedures but choose instead to use wardship. This may be because of the less satisfactory procedures and stricter rules of evidence in juvenile courts; or because the experience and standing of a High Court Judge is thought particularly valuable, perhaps in an unusually complex, delicate or difficult case; or because it may be

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89 Ibid., paras. 20.25-20.26.

90 [1981] 1 W.L.R. 379.

91 [1982] Fam. 53, 55, 59.

92 (1980) 3 F.L.R. 1.

thought better for the child and his family to make him a ward of court rather than to take hostile steps against his parents. On occasions, local authorities use wardship instead of the statutory procedures for appeal, as in Re W.,[93] where magistrates had refused to confirm a parental rights resolution, or in Re L.H.,[94] where magistrates had granted a parental application for access. The delays which the use of wardship can cause, and the consequent prejudice to the parents' case, have occasioned some adverse comment in the courts.[95]

3.36 In all of these cases, the price which the authority must pay for the advantages of wardship is the continued supervision of the court over its wards: no important step may be taken without the court's leave[96] and there is statutory power to direct the local authority in the exercise of their responsibilities in respect of wards committed to their care.[97] Authorities may sometimes welcome this; in

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93 (1982) 3 F.L.R. 129.

94 [1986] 2 F.L.R. 306.

95 See, e.g., the remarks of Ewbank J. in Stockport Metropolitan Borough Council v. B. [1986] 2 F.L.R. 80.

96 See para. 2.16 above.

97 Family Law Reform Act 1969, s.7(3).

Re P.,[98] for example, the authority warded a child who was already subject to a care order, so that the court rather than they could take the decision as to whether she should have an abortion which she wanted but her parents did not.

3.37 Many proposals of the Review of Child Care Law are designed to reduce both the need for local authorities to resort to wardship and the attractions of wardship in comparison with the statutory procedures. In the first category are recommendations for a new type of care proceedings to replace both the present care proceedings and the procedure for assuming parental rights by resolution.[99] New broadly based grounds would require proof of actual or likely harm to the child resulting from a lack of reasonable parental care or control and that a care order would be the most effective means of safeguarding and promoting the child's welfare.[100] This should greatly reduce the circumstances in which the risk that the more narrowly defined grounds cannot be proved obliges local authorities to resort to wardship. In the same category are the proposals that care orders should

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98 [1986] 1 F.L.R. 272; for a case where the court's directions were not so welcome, see Re D., The Times, 17 February 1987.

99 R.C.C.L., para. 3.26.

100 Ibid., para. 15.25.

only be discharged where this is in the child's best interests[101] and that local authorities should have the same rights of appeal against unfavourable decisions as do the child and his parents.[102] In the second category are proposals for improving the procedures in juvenile courts, including less rigidly structured hearings, the extension of the Civil Evidence Acts, and greater advance disclosure of the case on each side.[103]

3.38 The Review does not, however, propose that local authorities should be prevented from using wardship in the future, or that the grounds for and effects of committals to care in wardship should be the same as in all other proceedings, although it was recommended that we consider some aspects in the context of our own review.[104] If the Review's proposals are implemented, therefore, it would remain open to local authorities to use wardship in cases which might not be covered by the proposed new grounds but might be included within the present statutory

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101 Ibid., para. 20.19.

102 Ibid., para. 22.4.

103 Ibid., Ch. 16.

104 Ibid., para. 15.38; in particular the inherent power of committal and the meaning of "any other individual" in the statutory criterion for committal.

criterion in wardship, that there are "exceptional circumstances making it impracticable or undesirable for a ward of court to be, or to continue to be, under the care of either of his parents or of any other individual",[105] or in order to seek committal under the inherent power[106]. It would also remain open to authorities to use wardship in cases which could be covered by the new proceedings but where for some reason the authority preferred to use the High Court. This inevitably raises the question whether it is right in principle to enable local authorities to circumvent the limits of the statutory procedures or indeed to choose a forum which they prefer.

3.39 This question is all the more important because it is now clear that individuals, whether parents or non-parents, cannot use wardship in the same way. This is the effect of the decisions of the House of Lords in A. v. Liverpool City Council[107] and Re W.,[108] from which three principles emerge:

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105 Family Law Reform Act 1969, s.7(2).

106 See para. 2.19.

107 [1982] A.C. 363.

108 [1985] A.C. 791.

(i) wardship may not be used to supersede the statutory code governing the responsibilities of local authorities with regard to children;

(ii) wardship may not be used in place of judicial review as the remedy for abuse of such power by local authorities; but

(iii) wardship may still be used by local authorities to supplement the statutory code.

3.40 Before the decision in Re W. some cases were decided on the basis that where there are exceptional circumstances or some lacuna in the statutory scheme, the wardship jurisdiction could be used. Wardship was used, for example, in Re H.[109] to enable a child in care to be taken abroad by the parents, on the now discredited basis that although it could not be used to challenge the authority's exercise of their powers while the child was in care, it could be used to challenge the source of those powers; and in Re J.[110] to overcome the inability of the juvenile court to discharge a care order and at the same order a phased return of the child to the mother.

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109 [1978] Fam. 65.

110 [1984] 1 W.L.R. 81.

3.41 Nowadays nearly all attempts by individuals (whether parents, foster parents, relatives or others) to use the wardship jurisdiction against local authorities are unsuccessful; it seems unlikely that Re H. and Re J. would now be followed, for it is clear from Re W. that no "exceptional circumstances" category is admitted to prevail against the statutory code. The implication of Re W. seems to be that where the statutory code provides no redress for an individual the absence is to be treated not as a lacuna in the scheme, but as part of the scheme itself.

3.42 Hence, wardship has been refused to a father seeking to recover a child subject to a care order;[111] to parents seeking to recover their child after an appeal against a care order had failed;[112] to foster parents seeking to retain a child in voluntary care,[113] or a child subject to a parental rights resolution,[114] or a child subject to a care order;[115] to a mother seeking access to a child in care,[116] or subject to a place of safety order,[117] or objecting to the

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111 M. v. Humberside County Council [1979] Fam. 114.

112 Re W. (1982) 2 F.L.R. 360.

113 Re D.M. [1986] 2 F.L.R. 122.

114 Re M. [1961] Ch. 328.

115 Re T. (A.J.J.) [1970] Ch. 336.

116 Re W. [1980] Fam. 60; A. v. Liverpool City Council [1982] A.C. 363.

117 Re E. [1983] 1 W.L.R. 541.

authority's decision to terminate access;[118] to an unmarried father seeking to resist the termination of access and the making of arrangements for adoption;[119] and in Re W.[120] itself to relatives seeking care and control or access to a child subject to a care order. It is noticeable amongst this crop of failures that no distinction is drawn between cases in which the applicants have some right of recourse to the juvenile court, or some claim to consideration by the local authority, and cases in which no such right or claim exists. In the first class of case, it is held that no lacuna in the statutory scheme exists because there is some right of recourse.[121] In the second class, it is held that no lacuna exists because "the gap in the law arises from the express enactments of Parliament."[122]

3.43 It is also noticeable that wardship has been refused to individuals not only where the authority has parental rights by virtue of a resolution or care order,[123] but also where care proceedings have

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118 M. v. Berkshire County Council [1985] Fam. 60.

119 Re T.D. [1985] F.L.R. 1150.

120 [1985] A.C. 791.

121 M. v. Berkshire County Council [1985] Fam. 60.

122 [1985] A.C. 791, per Lord Scarman at p.802.

123 Re M. [1961] Ch. 328; Re T. (A.J.J.) [1970] Ch. 336.

begun,[124] or where the child is in voluntary care,[125] and even where care proceedings have not yet begun but it is very likely that they will be.[126] From the final category, it is beginning to seem that the true basis on which the wardship jurisdiction is withheld is not the exercise of statutory powers but their availability.[127]

3.44 However, local authorities are sometimes content to submit to the jurisdiction - where, for instance, they would have invoked it themselves if they had been first to the procedural post or where they accept that there is good reason for seeking the court's intervention. Thus in Re C.,[128] the authority had obtained a place of safety order for a child born to a surrogate mother, but did not resist the use of wardship by the commissioning parents; in A and B. v. Hereford and Worcester Council,[129] the authority took no jurisdictional point against an unmarried father who applied in wardship on behalf of his mother for care and control of his son who was in voluntary care; and in Re J.T.[130] the child's guardian ad litem in care proceedings used wardship to prevent the authority from implementing proposals for rehabilitating the child

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124 Re E. [1983] 1 W.L.R. 541.

125 W. v. Nottinghamshire County Council [1986] 1 F.L.R. 565.

126 W. v. Shropshire County Council [1986] 1 F.L.R. 359.

127 See W. v. Nottinghamshire County Council [1986] 1 F.L.R. 565, per Purchas L.J. at p.575; W. v. Shropshire County Council [1986] 1 F.L.R. 359, per Griffiths L.J. at p.370.

128 [1985] F.L.R. 846.

129 [1986] 1 F.L.R. 289.

130 [1986] 2 F.L.R. 107.

with his parents, proposals which the authority eventually agreed to abandon.

3.45 Individuals may also wish to challenge local authority decisions on the basis of abuse of power, in accordance with the principles declared in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation.[131] In the past, challenges on this basis have been allowed to proceed in wardship, but the most recent authorities insist that the proper procedure is by way of judicial review. Thus in Re D.M.[132] foster parents failed to maintain wardship where the complaint was one of irregularity in the procedure of the authority's adoption panel, and in Re R.M. and L.M.[133] foster parents' allegations that the authority had removed the child in order to deprive them of the opportunity to apply for custodianship was held to be a matter for judicial review and not wardship. Abuse of power under the statutory code, therefore, is no longer a ground for enabling the upbringing of the child to be controlled by the court instead of the local authority, unless the authority decide not to take the jurisdictional point.

3.46 The proposals of the Review of Child Care Law would, if implemented, improve the position of parents and relatives under the statutory scheme and thus reduce their wish to resort to wardship. Hence, the

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131 [1948] 1 K.B. 223.

132 [1986] 2 F.L.R. 122.

133 [1986] 2 F.L.R. 205.

Review recommends that parents, guardians and custodians should be parties to care proceedings[134] and should have a right to apply for the discharge of an order made in such proceedings.[135] Others should be able to take such part in care or discharge proceedings as the court directs,[136] and in certain circumstances to apply for custody.[137] Parents should have an independent right of appeal[138] and all appeals should lie to the Family Division of the High Court.[139] There should be a presumption of reasonable access to a child in care for both of married parents and unmarried mothers (unless deprived of access by a court order) and anyone else entitled to access under a court order, subject to the authority's right to apply for access to be stopped or varied.[140] The child should be able to apply for access to anyone who may apply for access to him,[141] and all parents and grandparents who are not covered by the presumption of reasonable access should be entitled to apply as they can in other proceedings.[142]

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134 R.C.C.L., para. 14.4.

135 Ibid., para. 14.5.

136 Ibid., para. 14.8.

137 Ibid., paras. 19.7 and 19.9.

138 Ibid., para. 22.3; see also Children and Young Persons (Amendment) Act 1986, s.2.

139 Ibid., para. 22.11.

140 Ibid., paras. 21.13 and 21.17.

141 Ibid., para. 21.20.

142 Ibid., para. 21.18.

3.47 Although these proposals would greatly improve the position of parents and others under the statutory scheme, they would not redress the basic difficulty that "the evasion of statutory restrictions by local authorities is considered legitimate supplementary assistance, while wardship applications by parents and third parties are seen as attempts to frustrate the legislative plan".[143] We note that both in the Court of Appeal and in the House of Lords in Re W., the decision to refuse wardship was reached with reluctance[144]. There must also be concern that nothing can be done for the child's welfare even where a local authority have acted in breach or disregard of their statutory responsibilities.[145]

Recalcitrant Teenagers

3.48 Wardship is occasionally invoked in an attempt to deal with difficult, uncontrollable or vulnerable teenagers.[146] Most of the cases concern a

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143 A. Bainham, "Relatives out of court" (1986) 49 M.L.R. 113, 115.

144 [1985] 1 All E.R. 1001 (Court of Appeal), per Oliver L.J. at p.1024, and Neill L.J. at p.1019, [1985] A.C. 791 per Lord Scarman at pp.801-802 and Lord Brightman at pp.808-809.

145 See, e.g., Lowe and White, paras. 16.34-16.36.

146 See Latey Report (1967), Cmnd. 3342, paras. 208-211, and the accounts given by Norman Turner, (1977) 2 Adoption and Fostering 33, and Cross J., (1967) 83 L.Q.R. 200, 210.

girl who is having or is about to have sexual intercourse with a man of whom her parents disapprove. Such a case was Re B. (J.A.), [147] in which a teenage girl was made a ward and an order made restraining a 42 year old married man from communicating with her. In Re P.C., [148] the couple were restrained from intermarrying, associating or communicating with one another for a certain time; in the event, they left the country and married without the court's consent.

3.49 Clearly, in these association cases, orders can only be effective if the teenager consciously or subconsciously wishes the association to come to an end or otherwise cooperates with the court [149]. If she insists on continuing the association there is little the court can do to prevent her, apart from invoking the power of committal which could be counter-productive. The practice is for the order to be made against the third party rather than against the ward in these cases. [150] The position may often be complicated by the girl being pregnant by the man concerned, but the court may not regard this as a sufficient reason for permitting them to marry if it is thought that the marriage would have little chance of success.

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147 [1965] Ch. 1112.

148 [1961] Ch. 312.

149 See Turner, op. cit. n.146.

150 Practice Direction [1983] 1 W.L.R. 800. See also Re F. (Orse A.) [1977] Fam. 58.

3.50 Wardship may also be invoked where teenagers are associating with drug takers or other undesirable groups, as in Re F.[151] The most recent reported case concerning a teenager was Re S.W.,[152] in which a 17 year old girl who repeatedly ran away was made a ward by her parents and placed with foster parents. There followed two court appearances and convictions for theft. At the wardship hearing, she was committed to the care of a local authority under the inherent powers of the court, although all the statutory powers to commit to care are limited to under 17 year olds. It was thought in that case that some benefit might be obtained from a few months' effort to control her behaviour.

3.51 The Official Solicitor is invariably appointed to represent the child in these cases, but his function is clearly to act and advise in the child's best interests rather than in accordance with her wishes.[153] Cases in this particular category, however, have become extremely rare: this may reflect a recognition of how little can usually be achieved, as well as a decreasing expectation within families that

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151 [1977] Fam. 58.

152 [1986] 1 F.L.R. 24.

153 For an account of the Official Solicitor's function see sources at n.146.

the lawful activities of older children can or even should be subject to their parents' control.[154]

Conclusion

3.52 From the above discussion, it emerges that even if current proposals for reform of the statutory procedures are implemented, there would still be no alternative to wardship, or wardship might seem to offer significant advantages, in the following situations:

(i) where a plaintiff wishes to "freeze" the status quo immediately;

(ii) where non-parents wish to challenge some specific aspect of upbringing or to apply for access;

(iii) where any plaintiff seeks an order, commonly an injunction, which is not available or clearly available under another jurisdiction;

(iv) where any plaintiff, but commonly a parent, wishes to control the activities of an older child, particularly a child of 17;

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154 See also the observations of Lord Denning M.R. in Hewer v. Bryant [1970] 1 Q.B. 357, at p. 369: "[Custody] is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice", approved by the majority of the House of Lords in Gillick v. West Norfolk and Wisbech Area Health Authority [1986] A.C. 112.

(v) where any plaintiff wishes to take advantage of the emergency basis of jurisdiction in "United Kingdom" cases;

(vi) where any plaintiff wishes to take advantage of the "allegiance" basis of jurisdiction in cases not covered by the Family Law Act 1986 or the Child Abduction and Custody Act 1985;

(vii) where a local authority wishes to invoke the jurisdiction for any reason;

(viii) where a local authority is content for another plaintiff to invoke the jurisdiction despite the existence or availability of the authority's statutory responsibilities in the case;

(ix) where the continued supervision of the court is desired for any reason;

(x) where the experience, standing and procedures of the High Court are desired for any reason.

3.53 It may also emerge from the above discussion that the functions of the wardship jurisdiction could be classified in the following way:

(i) it is an alternative jurisdiction, when it is used to achieve a result which could just as well be achieved under the statutory codes, as for example in many disputes between parents or where a local authority clearly has grounds for care proceedings;

(ii) it is an independent jurisdiction, when it is used to achieve an object which cannot be achieved under the statutory codes, as for example where a local authority has no grounds for bringing care proceedings or a non-parent has no standing to seek custody or access;

(iii) it is a supportive jurisdiction, when it is used to achieve more effectively a result which could be achieved under the statutory codes, as for example where a local authority wishes the court to endorse or enforce a particular decision relating to a child in care or a parent feels that it will be an added deterrent against kidnapping;

(iv) it is a review or appellate jurisdiction, when it is used to challenge a decision which has been taken under the statutory codes, as for example where a local authority wishes to challenge the decision of a juvenile court in care proceedings.

3.54 It will be recalled, however, that these functions are not universally available; in particular individuals cannot invoke any of them if to do so would conflict with the statutory responsibilities of local authorities and probably cannot invoke the appellate function in any event.

PART IV

OPTIONS FOR THE FUTURE

4.1 Wardship is a common law jurisdiction which exists alongside the statutory codes relating to the custody and care of children and, these days, for the same purposes, i.e. to protect the welfare of children whose upbringing is in question. In Part I we have put forward several reasons for examining whether reform is needed. In particular, the statutory codes are in the course of a comprehensive re-examination aimed at adapting them to modern needs. It is therefore necessary to consider the future relationship of wardship to those codes.

4.2 In Part II we have examined the main features of the wardship jurisdiction. For the purpose of this discussion, the most important ones are as follows:

(i) anyone can apply for wardship, although there are limitations (particularly in local authority cases) on the exercise of the jurisdiction;[1]

(ii) a wardship application has the immediate effect of a wardship order;[2]

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1 See para. 2.5.

2 See para. 2.8.

(iii) a wardship order vests guardianship in the court, thus (a) preventing the exercise of parental powers without the court's leave, and (b) enabling the court to exercise powers whether or not on application;[3]

(iv) the court is normally guided solely by what will be best for the child's welfare (although on occasions this must be balanced against considerations such as freedom of speech) and may make whatever order is necessary to promote that welfare;[4]

(v) the warding and dewarding of children are exclusively within the jurisdiction of the High Court.[5]

4.3 It is important to remember that wardship is a whole which comprises all these elements. Under the present law, they are not severable. The applicant is "in for a penny, in for a pound" and cannot opt for one part of the jurisdiction without the others, although the court can and does relinquish some aspects of parental responsibility, most noticeably care and control. One of the main questions in considering reform is whether the elements should remain inseparable in the future.

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3 See para. 2.15.

4 See para. 2.20.

5 See para. 2.12.

4.4 In Part III we have examined the present uses of the jurisdiction by reference to four basic conflicts: between one parent and another, between parents and other individuals, between local authorities and individuals, and between parents and children. In the course of this, several specific problems emerge which might require solution in any event. More fundamental questions, however, are raised by the concluding analysis of the present functions of wardship. We have suggested that, in relation to the statutory codes, those functions may be classified as follows:

(i) as an alternative jurisdiction, to achieve a result which can equally well be achieved under the statutory codes;

(ii) as an independent jurisdiction, to achieve a result which cannot be achieved under the statutory codes;

(iii) as a supportive jurisdiction, to achieve more effectively a result which can be achieved under the statutory codes; and

(iv) as a review or appellate jurisdiction, to challenge a decision which has been taken under the statutory codes.

4.5 Throughout, it must be remembered that a local authority may invoke the jurisdiction for all of these purposes, whereas private individuals (whether or not they have some legal relationship with the child) cannot use it for any of those purposes if to do so would conflict with the statutory responsibilities of local authorities in the child care field and probably cannot use it for appellate purposes in any event. It

can, moreover, be suggested that both the alternative and review or appellate uses of wardship should in principle be removed; that its use as an independent jurisdiction may be inconsistent with the spirit and aims of the statutory codes, at least once these have been comprehensively reformed; and that its use as a supportive jurisdiction points to ways in which the statutory codes should be improved. We develop these points further in considering the options for the future.

Options for the Future

4.6 We suggest three main approaches to reform:

(i) Option A: retain wardship as a separate jurisdiction, perhaps with some specific reforms;

(ii) Option B: make wardship a residuary jurisdiction;

(iii) Option C: incorporate some features of wardship within the statutory codes.

Many combinations and variations of these broad options could be devised, but it may clarify the arguments to consider them separately.

Option A: retain wardship as a separate jurisdiction, perhaps with some specific reforms.

4.7 In this option the basic features of wardship would remain unchanged, although certain specific reforms might be made[6]. For the time being, its uses would remain as they are at present. If current proposals for reform of the statutory codes were implemented, however, the need to use wardship would be considerably reduced, but the opportunity to do so would remain the same. Essentially, therefore, it would retain its four uses as an alternative, independent, supportive, and review or appellate jurisdiction.

4.8 In favour. The main argument in favour of retaining the present system is that it ensures that deficiencies in the statutory codes can be made good. It is, perhaps, unlikely that those who are responsible for framing the statutory codes will foresee every eventuality or provide properly for it. It is also consistent with the principle laid down in what is now section 1 of the Guardianship of Minors Act 1971, that decisions relating to the upbringing of minors should be governed by the "first and paramount consideration" of the child's welfare. If that is to be a principle of the substantive law, as opposed to a criterion upon which particular decisions may be made, it is necessary for the law to provide a remedy which is governed by that consideration alone: from the child's point of view, if he has a right to have his welfare put before all other considerations, then there should be a remedy exercisable on his behalf. It may, however, be an advantage that this remedy can only be initiated at

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6 See para. 4.13.

High Court level. This operates as a pragmatic rationing device, which may help to discourage hopeless applications or those which could equally well be dealt with elsewhere. It also ensures that the genuinely complex or exceptional cases are given appropriately careful treatment at the highest professional level.

4.9 Against. On the other hand, the continued existence of a universal jurisdiction may make nonsense of the statutory codes. If careful consideration has been given by all those responsible for framing legislation to the circumstances in which, for example, children should be committed to local authority care or non-parents be able to apply for custody or access, it is difficult to justify retaining an independent jurisdiction in which those circumstances can be ignored. The review or appellate function of the jurisdiction is an unsatisfactory substitute for a proper appeal structure under the statutory codes and is wholly unjustifiable when used as a second line of appeal. As an alternative to statutory procedures, it is unnecessary.

4.10 These objections are reinforced because the apparent universality of wardship is trammelled by the restrictions on its use by individuals in cases involving local authority care.[7] If derogation from the universality of the welfare principle is necessary, then it should be clearly stated and not left to

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7 See paras. 3.39-3.48.

be developed by the courts. Not only has this created uncertainty, but it has also led to an imbalance as between local authorities and individuals which is the subject of frequent complaint and criticism.[8]

4.11 While there is certainly a case for ensuring that the most difficult and complex cases are decided at the highest level, this is not the effect of the present law. Some cases are given "Rolls Royce" treatment when wardship can be invoked, but this is arbitrary in its application. It is, for example, for the local authority to decide whether to bring a case before the juvenile court in care proceedings or the High Court in wardship, and the choice of the juvenile court may be a means of avoiding the control of the High Court or the involvement of other parties, thus circumventing complexity rather than catering for it.[9] Further, as an unofficial rationing device, the results are equally arbitrary in that the use of wardship may depend as much on the resources and preferences of the adult parties as on the needs of the child. From the child's point of view, this arbitrary character also makes it difficult to give precise answers to such simple questions as "when may I leave home?" A divorce court is extremely unlikely to make a custody

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8 E.g. S. Maidment, "Wardship and Local Authorities - The Current Limits?" (1982) 132 N.L.J. 677; A. Bainham, "Relatives Out of Court" (1986) 49 M.L.R. 113; T. Lyon [1982] J.S.W.L. 232; N. Lowe, "To Review or not to Review?" (1982) 45 M.L.R. 96.

9 E.g. in Re D. [1986] 3 W.L.R. 1080, all were agreed that the child should be in care, but the authority brought care proceedings while the parents argued that the grounds did not apply and wardship would be preferable; hence the object of the authority's (successful) argument that the grounds did apply was to avoid wardship.

order contrary to the wishes of a 16 year old;[10] care proceedings cannot be brought, for example on the basis that the child is "beyond control" or "in moral danger", once the child has reached 17;[11] yet the possibility of wardship for similar purposes lasts until 18. A further objection to the present position is the "sledge-hammer" effect: if wardship is invoked for a particular purpose, the court must assume guardianship even though this is unnecessary or inappropriate to achieve that purpose.

4.12 These arguments would gain even more weight were the decision to be taken to establish a unified family court with a unified jurisdiction, or even to amalgamate the jurisdictions of the High Court and county courts in family matters.[12] The exclusive jurisdiction of the High Court to ward and deward children could no longer operate as an informal rationing device. Some means would have to be developed of preventing all cases, but particularly those which cannot be brought under the statutory codes, being brought before the court by means of wardship. This would be to set at nought the attempts of the statutory schemes to balance the competing interests involved and in particular to

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10 Hall v. Hall (1945) 175 L.T. 355.

11 Children and Young Persons Act 1969, ss.1(2) and 70(1); see also, e.g., Matrimonial Causes Act 1973, s.43(4).

12 See para. 1.4(d).

secure for families a proper degree of protection against interference from both other individuals and the State.

4.13 Specific Reforms. It could be suggested that some of the anomalies in the present system can be cured by means of specific reforms. There are some obvious candidates:

(i) Immediate Effect. It is difficult to assess whether the immediate effect of a summons is abused. Clearly it is susceptible to abuse, particularly now that the notice accompanying the originating summons warns that no "material step" can be taken without the court's leave.[13] This can permit local authorities or individuals with no other right to the child to preserve the status quo for what may turn out to be a considerable length of time. It may be more difficult for parents or others to argue for a change in the interim period and although the court may sometimes be more active in promoting a speedy hearing in wardship than it is in other custody disputes, it is clear that some cases can wait a very long time indeed to be heard.[14] If there is good reason to suppose that the child requires the immediate protection of the court, it may not be too much to ask that an ex parte order first be obtained.

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13 See para. 2.8.

14 See e.g., Stockport Metropolitan Borough Council v. B. [1986] 2 F.L.R. 80.

(ii) A. v. Liverpool City Council. One answer to the problems posed by the combined effect of the decisions in A. v. Liverpool City Council[15] and Re W.[16] would simply be to reverse them by statute. The great attraction of this would be that it would enable parents, relatives and indeed the child himself to invoke wardship where they were sufficiently dissatisfied with a decision of the local authority in relation to a child in care to wish to challenge it in this way. It is, after all, unlikely that every single decision taken by a local authority is in fact in accordance with the requirement that "first consideration" be given to the need to safeguard and promote the welfare of the child throughout his childhood.[17] However, the Review of Child Care Law argued against any increase in the powers of courts to review decisions in respect of children in care. First, "the expertise of a court lies in its ability to hear all sides of the case, to determine issues of fact and to make a firm decision on a particular issue at a particular time, in accordance with the applicable law. It cannot initiate action to provide for the child, nor can it deliver the services which may best serve the child's needs."[18] Furthermore, "it is also necessary that the

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15 [1982] A.C. 363.

16 [1985] A.C. 791. See paras. 3.39 et seq.

17 Child Care Act 1980, s.18(1).

18 R.C.C.L., para. 2.23.

body with day-to-day responsibility for the child should have a positive duty to 'take a grip on' the case and make firm and early decisions without the temptation to pass responsibility to another body".[19] Even as a mechanism for resolving particular disputes and complaints, a court may be too slow and inaccessible to be a realistic option save for a relatively small number of decisions, which would have to be prescribed. The Review itself suggests that access should be provided for in this way, but nothing else.[20]

(iii) Restore "judicial review" function. An alternative and less radical solution to the problem posed following A. v. Liverpool City Council and Re W. would be to allow the jurisdiction to be exercised in care cases where the grounds exist for judicial review of the local authority's decisions, i.e. on the principles laid down in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation.[21] The advantages of this are that similar safeguards for local authorities as are provided for under the normal judicial review procedures[22] could be applied in wardship, but that the child's welfare could be directly provided for in a case where it was shown that the authority had acted in

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19 Ibid., para. 2.24.

20 Ibid., Ch. 21.

21 [1948] 1 K.B. 223.

22 R.S.C., 0.53.

breach of their statutory responsibilities. Some protection could be given in the "worst" cases, without opening the floodgates. Consideration could also be given to whether any person could apply or only the child, his parents and perhaps others who will have some standing under the revised form of care proceedings.

(iv) Grounds for Committal to Care. Some of the imbalance created by the House of Lords decisions would be redressed by the Review's proposals in any event, as these make considerable improvements to care proceedings from the point of view both of local authorities and of parents and other relatives.[23] Further consideration might be given to restricting the grounds upon which children may be committed to care in wardship proceedings to those which are to be prescribed for care proceedings and also for committals in the course of divorce and other family proceedings.[24] This would have the advantage of solving the "constitutional" problem that the defined grounds for State intervention in family life can be circumvented by means of wardship under the existing law.[25] Logically, this would also suggest that the other safeguards applicable,

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23 See paras. 3.37 and 3.46.

24 R.C.C.L., paras. 15.35-15.38; para. 3.37 above.

25 See para. 4.9.

for example the procedures for representing the child's interests and the duration of interim orders,[26] should also apply in wardship.

4.14 We should very much welcome views as to whether any or all of these specific changes, and any further reforms which may be suggested[27], would be acceptable in their own right and would constitute a sufficient answer to the fundamental difficulties outlined in paragraphs 4.9 to 4.12 earlier. Our provisional view is that they do not constitute a sufficient answer to those difficulties and accordingly we have considered whether other options may do so.

Option B: make wardship a residuary jurisdiction.

4.15 Under this option wardship would exist solely to make good deficiencies in the statutory codes. It could not be used as an alternative or appellate jurisdiction, at least where rights of appeal exist. Nor could it be used as an independent jurisdiction where such a use was inconsistent with the statutory

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26 R.C.C.L., paras. 14.16-14.18 and ch. 17; see further Law Commission Working Paper No. 100, Care, Supervision and Interim Orders in Custody Proceedings (1987).

27 It may, for example, be suggested that the "allegiance" basis of jurisdiction is out of place in the modern world; that the age limits for controlling the behaviour of older children should be brought into line with those in care proceedings; or that the provisions governing maintenance for wards should be harmonised with those under the Guardianship of Minors Act 1971 and any inherent powers clarified.

codes, for example in allowing local authorities to assume care when they cannot do so under the statutes or in providing rights of access which are not provided for under the statutes. It could, however, be used as a supportive jurisdiction, for example where parental friction was so great as to make it desirable that custody should vest in the court; or as an independent jurisdiction where this was not inconsistent with the substance of the codes, for example in providing a mechanism for handling disputes between parents and children.

4.16 In favour. This would retain the main advantage of option A, the making good of deficiencies in the statutory codes, whilst eliminating unnecessary duplication and conflicts of jurisdiction. It would also give High Court wardship a more justifiable role by confining the jurisdiction to cases likely to possess unusual features, in which both the status of the court and the assumption of guardianship would be appropriate. Moreover, it would automatically redress the imbalance created by the Liverpool case,[28] because neither local authorities nor others would be permitted to use wardship as a means of circumventing requirements of the statutory code which they could not fulfil. If it were practicable to achieve this residuary role for wardship, therefore, it might retain the virtues of the present system without its defects.

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28 See paras. 3.39 et seq.

4.17 Against. Unfortunately, we see great difficulty in defining the circumstances in which this residuary jurisdiction would arise. What test could be adopted to distinguish between those cases in which it was supporting or acting independently of the statutory codes and those in which it was circumventing them?[29] A test based on the presence of a "lacuna" raises this problem immediately: how can one distinguish a deliberate gap left for good reasons from an inadvertent one for which no good reason can be divined? A test based on "exceptional circumstances" or some similar formula runs into the same problem, because exceptional circumstances are likely to be construed to mean either "not covered by the statutory code"[30] or, perhaps worse, "covered by the statutory code but exceptional even so".

4.18 In any event, it can be argued that the approach is wrong. If wardship is to be a residuary jurisdiction as a back-up for the statutory codes, it is for the codes themselves to provide for it and, if possible, to define the circumstances in which it

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29 It may be possible to recognise the difference between a hole in a blanket, which needs to be patched, and a hole in Swiss cheese, which is part of the fabric and virtue of the cheese itself, but it is difficult to describe it in legislative language.

30 See, e.g., Re C.B. [1981] 1 W.L.R. 379, where it was said that any case in which committal to care was contemplated was, almost by definition, exceptional.

should be used. If they do this, however, why continue wardship as a separate jurisdiction?

4.19 Further, this approach does not distinguish between the grounds or circumstances in which wardship can be invoked and the resulting powers and effects. For example, if a local authority can show circumstances justifying a care order outside the statutory grounds, should the child have to be made a ward of court whether or not this is appropriate? Conversely, if there are good reasons for the court to assume continuing supervision over the child's life, why should this not be available on the same grounds and in the same circumstances as the other orders but not outside them?

4.20 These objections lead us to consider whether it might not be more appropriate to abolish wardship as a separate jurisdiction altogether, but incorporate its useful features into the statutory codes.

Option C: incorporate some features of wardship within the statutory codes.

4.21 Under this option, wardship would cease to be a separate jurisdiction but its more desirable features would be incorporated into the statutory codes of both private and public law. The object would be to preclude people or authorities from acquiring rights in relation to children which they could not acquire under the statutes, while improving the machinery available under those statutes for the protection of children.

4.22 Hence, in private law this option would prevent a non-parent from applying through wardship for care and control or access if not qualified to do so under the code; nor could such a person apply for the determination of particular issues. If the current proposals in the Review of Child Care Law and in our Working Papers on Custody and Guardianship were implemented, however, this would not be a great change in the law. It would mean (subject to what is said below about injunctions) that an outsider could not use wardship, for example, to obtain access or to prevent or allow medical treatment against the parents' wishes. In public law, this option would prevent local authorities from obtaining compulsory powers of care or supervision over a child which they could not obtain under the statutes.

4.23 The question would then arise as to which features of the wardship jurisdiction might be incorporated. The following are the most obvious candidates:

(i) Immediate Effect. If this were to be retained, it would be necessary to decide in what cases it would be appropriate for it to apply. It would be difficult to justify imposing it upon all applications for custody or care and equally difficult to limit it to those cases in which the desired outcome was continuing supervision by the court. Further, as we have suggested earlier,[31] there are good arguments against the immediate effect in any event.

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31 See para. 4.13(i) above.

(ii) Outcome. There may well be some exceptionally difficult cases in which the continued supervision of the court is desirable, after the decision has been made to award parental responsibilities to some person or authority (whether by means of guardianship, custody, care and control or care orders). Thus wardship might become an additional order, somewhat akin to the present form of supervision order,[32] but with the court as supervisor. This might take several forms:

(a) requiring the court's leave for all "material steps" relating to the child;

(b) allowing the court to specify which steps should be referred back, as may happen with changes of name or emigration in divorce cases at present; or

(c) requiring regular reviews by the court.

An advantage of this approach is that it would retain, in exceptional circumstances, the present power of the court in wardship to exercise some supervision or provide some guidance for local authorities, but strictly as an additional order made by the court on committal to care on the prescribed grounds.

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32 By which the court directs the child to be placed under the supervision of a local authority or probation officer. See Part II, n.42.

(iii) Recalcitrant Children. This use of the jurisdiction is now so rare that it may no longer be needed.[33] However, it could be incorporated within the statutory schemes by allowing those with parental responsibilities under those schemes to seek orders against their children or against others to protect their children, in other words in support of their existing parental responsibilities. It might, however, be objected that if the child has attained the age and capacity at which such activities are lawful, there is no justification for restraining them.

(iv) Single Issues. As indicated earlier, this approach would make it difficult for someone such as the plaintiff in Re D.[34] to attempt to prevent a highly controversial step, such as the sterilization of a young girl. It is extremely unlikely that any such case would not be covered by something equivalent to the proposed new care grounds: i.e. that there is a risk of harm to the child's health or development which is the result of something within the home and which could most effectively be prevented, in the interests of the child, by means of an order relating to that issue alone. In other words, there

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33 See paras. 3.48-3.51.

34 [1976] Fam. 185; see para. 3.27.

could be cases covered by the care grounds which would not merit the "sledge-hammer" of a full care order. Might it be possible to incorporate them by allowing applications for specific orders to protect the child on similar grounds (and with leave of the court)?

(v) High Court. It is clearly essential to preserve a system under which the most difficult and complex cases can be handled by a court of appropriate standing and experience, and with the assistance of representatives for the parties and the child (including the Official Solicitor) of an appropriate quality. Within a unified family court, this could be handled by internal arrangements for the allocation and transfer of cases. Within the present jurisdictions, it could be dealt with by transfer provisions equivalent to those which already exist in some cases.[35] The advantage of this would be that allocation lay within the courts' control rather than that of the parties.

4.24 In Favour. This option would ensure that wardship was consistent with the statutory codes and could not be used to give people substantive rights which they did not possess elsewhere. It should also ensure that the features of wardship which are needed

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35 Matrimonial and Family Proceedings Act 1984, ss.38 and 39; County Courts Act 1984, s.41; see also Guardianship of Minors Act 1971, s. 16(4); Children Act 1975, s. 101(3); Domestic Proceedings and Magistrates' Courts Act 1978, s.27.

to protect children are available in all the custody and care jurisdictions. It would carry to its logical conclusion one important aim of the current proposals, particularly in the child care field, which is to reduce the need for wardship as an independent jurisdiction. It would provide the opportunity for a more rational distribution of business between the existing courts, but would equally be consistent with a unified family court.

4.25 Against. This option would, of course, put the burden on the statutory schemes to be flexible enough to cover all the situations in which a child might require the court's protection. It is for that reason that we have sought to identify at some length the uses to which the jurisdiction is currently put. We should therefore welcome views upon any that we have failed to identify or for which special provision might be required.

Conclusion

4.26 As we have explained, the purpose of this paper is to highlight and present broad options to deal with the issues raised by the wardship jurisdiction, in the light of recent comprehensive reviews of the statutory jurisdictions relating to the welfare of children in both public and private law, and of the Interdepartmental Review of Family and Domestic Jurisdiction. We shall then be in a position to formulate specific proposals for reform in the light of the outcome of those reviews, and of the many comments we hope to receive in response to this paper.

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